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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Case No. ~~1094~~ 196

HARLEM PAPER PRODUCTS CORP. and DAVID KASSON,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	3
STATUTE INVOLVED	4
STATEMENT OF THE CASE	4
ARGUMENT IN SUPPORT OF WRIT OF CERTIORARI	10
A. A ruling that participation by Harlem Paper Products Corp. in a conspiracy which terminated in 1947 can be inferred retroactively from the fact that it was allegedly represented subsequent to such termination by a co-conspirator is clearly invalid	10
B. The facts set forth in Commission Exhibits 868 and 869—that Kasson represented Harlem Paper Products Corporation on October 28, 1948 and April 4, 1949—were erroneous	14
C. Participation by the petitioner David Kasson in local trade association meetings does not supply proof of membership in an illegal conspiracy	16
D. The Federal Trade Commission failed to make specific findings of fact in its report with respect to the petitioners, as required by Section 5(b) of the Federal Trade Commision Act, that they or either of them violated the said act	19
CONCLUSION	21
APPENDIX A. Decision of United States Court of Appeals dated January 9, 1957	23
APPENDIX B. Decision of United States Court of Appeals on petition for reargument dated February 18, 1957	32
APPENDIX C. Decree of United States Court of Appeals dated March 19, 1957	34

Cases Cited

	PAGE
Krulewitch v. United States, 336 U. S. 440 (1949), rev'g. 167 F. (2nd) 1943 (2d Cir.)	17
National Lead Company v. Federal Trade Commission, 227 F. 2d 825 (7th Cir., 1955)	18
Phelps Dodge Refining Corp. v. F. T. C., 139 F. 2d 393, 396 (C. C. A. 2d)	8, 10
Western Sugar Refining Co. v. Federal Trade Commission, 275 Fed. 725, 732	17fn.

Other Authorities Cited

Note 62 Harv. L. Rev. 276 (1948)	18
O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592, 602 (1948)	18

Statutes Cited:

Federal Trade Commission Act:	
15 U. S. C. §45(a)	4
15 U. S. C. §45(b)	19
15 U. S. C. §45(c)	2

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari be issued to review the decision and decree of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on March 19, 1957 and (reported in —— F. 2d ——) affirming in part and reversing in part an order of the Federal Trade Commission.

This order of the Federal Trade Commission found the petitioners, among others, had engaged in a conspiracy to fix uniform prices and discount terms in the sale and distribution of paper in violation of Section 5(a) of the Federal Trade Commission Act, 15 U. S. C. §45a.

Petitioners invoke the jurisdiction of this Court upon the ground that the United States Court of Appeals erred in affirming the order of the Federal Trade Commission as to both petitioners Harlem Paper Products Corp. and David Kasson, and, in so doing, decided a federal question in a way in conflict with applicable decisions of this Court.

There were two decisions of the United States Court of Appeals. The first decision dated January 9, 1957 reversed the order of the Federal Trade Commission as to several petitioners for review, including the Imperial Bag & Paper Co., Inc. and Daniel W. Margolin, d/b/a Liberty Bag & Paper Co. (which firms had been members of the Cosmopolitan Twine & Paper Association, Inc.) and affirmed the order of the Federal Trade Commission with respect to the petitioners Harlem Paper Products Corp. (also a member of said Cosmopolitan Twine & Paper Association, Inc.), and the petitioner David Kasson, the President and Executive Director of said Association.

Thereafter, a timely petition for rehearing was filed on behalf of the petitioner, Harlem Paper Products Corp. This petition for rehearing was denied by the United States Court of Appeals on February 18, 1957, but in the course of its denial the Court of Appeals in a supplemental decision ordered that a portion of its original slip opinion referred to *infra* be changed. Subsequently, the decree of the Court of Appeals in question was made and entered on March 19, 1957.

Jurisdiction to review the decree in question by writ of certiorari is conferred on this Court by virtue of the provisions of Section 5(c) of the Federal Trade Commission Act, 15 U. S. C. 45(c).

Questions Presented for Review

This case involves the validity of a cease and desist order of the Federal Trade Commission issued against the petitioner, Harlem Paper Products Corp. and the petitioner, David Kasson, and others as a result of a complaint which originally had been directed against the National Paper Trade Association, its officers, 23 affiliated local associations, their officers, and some 1100 paper merchant members of the local associations.

The questions involved are as follows:

1. Whether the order of the Federal Trade Commission as against these two petitioners can be sustained where there was a complete absence of proof that both of the petitioners herein engaged in or committed, or threatened to engage in or commit any act prohibited by Section 5 of the Federal Trade Commission Act.

2. Whether the order of the Federal Trade Commission as against the petitioner, Harlem Paper Products Corp., can be sustained where the only facts claimed to show proof of a conspiracy on its part occurred *after* the issuance of the Federal Trade Commission complaint and the termination of the alleged conspiracy.

3. Whether the order of the Federal Trade Commission as against the petitioner, Harlem Paper Products Corp., can be sustained where the facts set forth in the Government exhibits 868 and 869, the only exhibits concerning this petitioner, were undisputably erroneous.

4. Whether the order of the Federal Trade Commission as against these petitioners can be sustained where

there were no specific findings of facts in the report of the Federal Trade Commission with respect to these petitioners, as required by Section 5(b) of the Federal Trade Commission Act, that they or either of them engaged in or committed, or threatened to engage in or commit any act prohibited by said Act.

Statute Involved

The statute involved is the Federal Trade Commission Act (15 U. S. C. §45(a)) which provides:

> "(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

Statement

Proceedings were initiated on October 5, 1948 by a complaint of the Federal Trade Commission which charged the National Paper Trade Association, its officers, 23 affiliated local associations, their officers and some 1100 paper merchant members of the local trade Associations with a nation-wide conspiracy to fix uniform prices and discount terms in the sale of fine and wrapping papers.

Included in the respondents named in the complaint were three members of one of the local associations, Cosmopolitan Twine & Paper Association, Inc. (hereinafter called "Cosmopolitan"), *i.e.*, Harlem Paper Products Corp., Imperial Bag & Paper Co., Inc. and Daniel W. Margolin, which firms were selected at random by the Federal Trade Com-

mission as representatives of the membership of said local trade association (Complaint Par 4).

Petitioner David Kasson (hereinafter called "Kasson") was named in the complaint as President of said Cosmopolitan Twine & Paper Association, Inc. (195a).*

Each of the petitioners on review (as well as the vast majority of the respondents below who did not petition for review) filed a substitute answer herein which specifically stated that such parties did not admit any of the charges contained in the complaint (209a) except the jurisdictional allegations thereof.

These substitute answers did, however, contain a concession that inferences might be drawn from the documentary evidence which might be introduced by the Commission allegedly in support of the allegations of the complaint (208a).

The record pertaining to the 1100 associations, firms and individuals listed in the complaint consisted almost entirely of documentary evidence, to wit, 864 Commission exhibits.

Included in the 864 Commission exhibits were four exhibits (Exs. 657, 658, 659 and 660) which constituted minutes of meetings of the Cosmopolitan Twine & Paper Association, Inc., held in New York.

None of these minutes, however, contained anything to warrant an inference that any member of the Cosmopolitan Association or any officer of Cosmopolitan were parties

* The reference is to the joint printed Petitioners' Appendix filed with the United States Court of Appeals, Second Circuit.

to a conspiracy to violate Section 5 of the Federal Trade Commission Act.

Also included in the 864 Commission exhibits were two exhibits (Exs. 868 and 869) which constituted programs of the National Paper Trade Association Conventions held by it on October 28, 1948 and April 4, 1957, and which programs referred to petitioner, David Kasson, as a representative of the petitioner, Harlem Paper Products Corp.

As shown *infra*, not only were such conventions held on dates which followed the filing of the Federal Trade Commission complaint herein and the termination of the alleged nation-wide conspiracy, but also the facts contained therein were erroneous in that David Kasson did not attend said conventions as a representative of the Harlem Paper Products Corp.

At the conclusion of the hearings, the Federal Trade Commission issued a cease and desist order against the National Paper Trade Association, Inc., each of the 23 regional local trade associations, and approximately 200 local respondent merchant firms and individuals, including the two petitioners herein.

At the same time, the Federal Trade Commission dismissed the proceeding against (a) six (6) local merchant firms and individuals who had actively contested the charges against them and (b) nine hundred (900) merchant firms listed in the exhibits annexed to the complaint (67a, 68a).

A petition for review of said order was filed by several petitioners represented by different counsel, including the petitioners herein, Harlem Paper Products Corp. and

David Kasson, and by two other petitioners below, Imperial Bag & Paper Co., Inc. and Daniel W. Margolin, d/b/a Liberty Bag & Paper Co., which four (4) petitioners were represented by the same attorneys, Wechsler & Solodar, Esqs.

On appeal from the final order and decision of the Federal Trade Commission, the United States Court of Appeals reversed as to several of the petitioners for review in that Court, including Imperial Bag & Paper Co., and Daniel W. Margolin, doing business as Liberty Bag & Paper Co., both of whom had been members of the Cosmopolitan Twine & Paper Association, Inc.

In so reversing as to these firms, the Court of Appeals wrote as follows:

> "(10) *Imperial Bag & Paper Co., Inc.; Daniel W. Margolin d/b/a Liberty Bag & Paper Co.* These two members of Cosmopolitan were selected at random to represent the class of members. The proof against them is identical with that against Shuttleworth Wollny Co., Inc., discussed previously; and is similarly insufficient."

In referring to the Shuttleworth Wollny Co., Inc. which also secured a reversal of the Federal Trade Commission order, the Court referred to the previous portion of its decision where it held that there was no proof that any of its representatives attended any meetings, paid any dues or participated in the activities of its local association or the National Association; that there was no basis for inferring that it had any knowledge of its associates' illegal activities and that "the Commission may not infer par-

ticipation in a conspiracy from mere membership in a trade Association without more. *Phelps Dodge Refining Corp. v. F. T. C.*, 2 Cir. 139 F. 2d 393, 396."

The Court of Appeals, however, in its opinion below, affirmed the Federal Trade Commission order both as to Harlem Paper Products Corp. (which had likewise been named in the complaint as a member of the Cosmopolitan Twine & Paper Association, Inc., selected at random) and as to David Kasson.

In affirming as to Harlem, the Court of Appeals erroneously held in its first decision that Harlem had been represented from 1934 to 1947 by David Kasson.

This portion of the Court's first decision originally read as follows:

> "(8) *Harlem Paper Products Corporation.* Harlem was a corporate member of Cosmopolitan—one of four local trade associations in greater New York City. Mr. David Kasson, a leader in all aspects of restraint of trade in wrapping paper products in this region from 1934 to 1947, represented Harlem throughout this period, including the times when he served on the 1936 and 1940 regional councils. There is sufficient evidence against Harlem."

Thereafter, as stated *supra*, a petition for rehearing was filed by Harlem which pointed out that the only Commission exhibits which referred to Harlem and which referred to the alleged representation of Harlem by David Kasson, were the two Commission exhibits 868 and 869, *i.e.* the National Paper Trade Convention programs of October 28, 1948 and April 4, 1949.

However, the Court of Appeals erroneously denied the petition for rehearing but changed one sentence in that portion of its original slip opinion which referred to Harlem. The Court's decision on the petition for rehearing read as follows:*

> "*Petition for rehearing denied.*
>
> The second sentence of the paragraph on page 357 of the slip opinion headed '(8) Harlem Paper Products Corporation' is changed to read: Mr. David Kasson, a leader in all aspects of restraint of trade in wrapping paper products in this region from 1934 to 1947, represented Harlem in 1948 on the Board of Directors of the National Association."

Although as shown *infra*, the Court of Appeals in its final decision corrected the contention that Harlem had been represented by David Kasson from 1934 to 1947, the correction it made did not go far enough since the fact that Kasson allegedly represented Harlem on October 28, 1948 and thereafter, *after* the termination of the conspiracy and after the institution of the Federal Trade Commission proceedings, was both irrelevant and erroneous, and was certainly insufficient proof of Harlem's participation in the conspiracy prior to October 5, 1948.

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* This decision on the petition for rehearing was *per curiam*, in view of the unfortunate death of Mr. Justice Frank who had participated in the original decision but died prior to the filing of the rehearing petition.

ARGUMENT IN SUPPORT OF WRIT OF CERTIORARI

A. A Ruling That Participation by Harlem Paper Products Corp. in a Conspiracy Which Terminated in 1947 Can Be Inferred Retroactively From the Fact That it Was Allegedly Represented Subsequent to Such Termination by a Co-conspirator is Clearly Invalid.

The reversal by the Court of Appeals as to Imperial Bag & Paper Co., Inc. and Daniel W. Margolin on the ground that these two members of the Cosmopolitan Twine & Paper Association, Inc. had been merely "selected at random to represent the class of members" of the Association, that the proof against these two merchant firms was "insufficient", and that "the Commission may not infer participation in a conspiracy from mere membership in the trade association", citing *Phelps Dodge Refining Corp.* v. *F. T. C.*, 139 F. 2d 393, 396 (C. C. A. 2d), was clearly proper.

However, through an error, the order below was initially affirmed as to the petitioner, Harlem Paper Products Corp. the third merchant member of the Cosmopolitan Twine & Paper Association, Inc. (likewise selected at random by the Federal Trade Commission to represent the class of 43 members of said Association), due to the Court's erroneous belief that said Harlem Paper Products Corp. had been represented throughout the period in controversy, *i.e.* 1934 to 1947 by said David Kasson, the President of said Association.

This erroneous belief is shown by the original decision of the Court of Appeals quoted *supra* where it was stated that Kasson represented Harlem from 1934 to 1947.

In our petition for rehearing we showed conclusively that none of the 864 exhibits introduced in evidence by the Federal Trade Commission indicated a relationship of any kind between David Kasson and the Harlem Paper Products Corp. except two erroneous Commission exhibits, Nos. 868 and 869, discussed *infra*.

We also showed conclusively that throughout the entire period from 1934 to 1947, Kasson was either the Executive Director or the President of the Cosmopolitan Twine & Paper Association, Inc. and was frequently referred to in the various exhibits introduced into evidence by the Commission as such. For example, in Commission Exhibits 657A, 747A, 749, 760, 762, 766, 769, 770, *Kasson is expressly referred to as the representative of and/or Executive Director of the Cosmopolitan Twine & Paper Association, Inc.*

Similarly, paragraph Three, subdivision (v) of the complaint and *the findings of fact of the Federal Trade Commission refer to said David Kasson solely as the President of said Association* at the time of the service of the commission's complaint dated October 5, 1948 (195a, 35a).

The *only* reference to David Kasson in the record as an alleged representative of the Harlem Paper Products Corp., is an erroneous reference contained in the two aforementioned Commission Exhibits 868 and 869 (respondent's Appendix, pp. 48, 49). These exhibits consist of a reprint of two National Paper Trade Association convention programs dated October 28, 1948 and April 4, 1949, respectively.

(As shown *infra*, these two exhibits were factually erroneous in that David Kasson should have been listed as the representative of the Cosmopolitan Twine & Paper Asso-

ciation, Inc. and not as being connected or affiliated with or representing the Harlem Paper Products Corp.).

However, even if we assume, *arguendo* only, that these convention programs were correct in all respects, these exhibits were an insufficient basis for the Court of Appeals to have based its affirmance of the Commission order as to petitioner, Harlem Paper Products Corp.

This is so for the reason that said exhibits referred to proceedings held on "October 28-30, 1948" and "April 4-6, 1949", both of which dates are subsequent to the date of the complaint itself, October 5, 1948 (200a).

The error on the part of the Court of Appeals was due solely to the fact that respondent's brief (p. 21) referred to David Kasson as the alleged representative of the petitioner, Harlem Paper Products Corp., in 1948 and 1949 (citing the erroneous Commission Exhibits 868 and 869 dated October 28, 1948 and April 4, 1949) and, *in the same paragraph* of the brief, reference was made to prior activities of Kasson as a representative of Cosmopolitan Twine & Paper Association, Inc. from 1934 to 1947, citing seven (7) Commission exhibits referred to *supra* in a footnote to page 21 of its brief.

Because these years and exhibits were commingled in one paragraph, the Court of Appeals mistakenly assumed Kasson represented Harlem Paper Products Corp. prior to October 5, 1948 and stated in its original opinion quoted above that Kasson, "from 1934 to 1947 represented Harlem throughout this period * * *."

Following the filing of a petition for rehearing in which the above error was pointed out to the Court of Appeals,

the Federal Trade Commission was required by the Court to file an answer to the petition.

In its answer (p. 3), (a copy of which is contained in the certified transcript of the record below), the Commission merely claimed that Government Exhibits 868 and 869 showed that "David Kasson was a member of or connected with the paper merchant Harlem during the entire period of time covered by the complaint"—an erroneous claim because Exhibits 868 and 869 covered Convention proceedings as of October 28, 1948 and April 5, 1949.

The Court of Appeals recognized the error in its original decision and, as stated *supra*, directed the correction of one sentence thereof, but at the same time denied the petition for rehearing, and left its original ruling as to Harlem unchanged.

The net effect of the correction in the wording of the decision was to delete the original erroneous statement that Kasson represented Harlem from 1934 to 1947—but to substitute instead the fact that representation by Kasson of Harlem on [October 28] 1948 was sufficient evidence of Harlem's participation in the conspiracy which lasted, according to the complaint dated October 5, 1948, from 1934 to 1947.

The mere statement of such a theory of retroactive guilt by representation demonstrates its unfairness, illegality and unconstitutionality.

Clearly, it was error for the Commission and the Court to have assumed that David Kasson was the representative of Harlem Paper Products Corp. for the period from 1934 to 1947 from the fact that he was erroneously believed to

have represented Harlem Paper Products Corp. between October 28, 1948 and April 4, 1949.

Under these circumstances, there was no substantial evidence to justify the action by the Federal Trade Commission in issuing a cease and desist order against the Harlem Paper Products Corp.

On the contrary, said order should have been reversed by the Court of Appeals as to Harlem Paper Products Corp. in the same manner, and for the same reason as it was reversed as to the other two merchant firms selected at random and belonging to the Cosmopolitan Twine & Paper Association, *i.e.* the Imperial Bag & Paper Co., Inc. and Daniel W. Margolin, doing business as Liberty Bag & Paper Co.),—to wit, for lack of substantial evidence that petitioner was a conspirator.

B. The Facts Set Forth in Commission Exhibits 868 and 869—That Kasson Represented Harlem Paper Products Corporation on October 28, 1948 and April 4, 1949—Were Erroneous.

As appears from the exhibits annexed to the petition for rehearing filed by Harlem, to wit, the affidavits of David Kasson and Harlem Paper Products Corp., respectively, no relationship of any kind existed between David Kasson, the Executive Director and President of the Cosmopolitan Twine & Paper Association, Inc. and the Harlem Paper Products Corp. at any time from 1934 to date, and the reference in Commission Exhibits 868 and 869 to David Kasson as a representative of Harlem Paper Products Corp. was entirely the result of an error in the preparation and printing of the said programs.

The Commission's answer to the petition for rehearing made no claim that our contention was not factually correct.

Instead, the Commission's answer took the technical position that the petitioner, Harlem Paper Products Corp., should have pointed out the error in these two exhibits sooner than it did, instead of waiting for its petition for rehearing to prove the error.

The fact is that the error was not pointed out sooner than it was because:

1. Harlem had agreed by the terms of its substitute answer that it "will not offer explanation of or evidence to contradict the [documentary] evidence which they consent to be made a part of the record"; and

2. Such error was deemed by Harlem to be not prejudicial and inconsequential, since Harlem did not dream that erroneous proof of its representation by any individual on and after October 28, 1948 could be deemed to be retroactive proof of its representation by the same person (a) between 1934 and 1947 or (b) up to the time the complaint was filed on October 5, 1948.

The net result, however, has been an unconscionable one since there is no denial by the Commission of the program maker's error in the two Convention programs of October 28, 1948 and April 4, 1949.

C. Participation by the Petitioner David Kasson in Local Trade Association Meetings Does Not Supply Proof of Membership in an Illegal Conspiracy.

The *only* documentary evidence introduced by the Commission which concerned the petitioner Kasson, consisted of minutes of meetings either of members or directors of their local trade association, the Cosmopolitan Twine & Paper Association, Inc., and of minutes of meetings of a neighboring local trade association, the Paper Trade Association of New Jersey which were attended by the petitioner Kasson.

It is clear, however, that mere attendance and participation in lawful meetings of such associations does not *per se* automatically make those persons attending such meetings members of an illegal conspiracy where the minutes do not show any illegality in the action taken thereat.

The minutes of these various meetings show that not only did the Commission fail to show any impropriety or illegality in the business adopted thereat, but on the contrary show a repeated intent and purpose to comply with the law at all times.

Thus, while the petitioner, Kasson, who was then Executive Director of the Cosmopolitan Association, attended such meetings, there is no basis for inferring any illegality on his part, or membership in an illegal conspiracy, by virtue of his attendance at these lawful meetings, where lawful purposes of any trade association were carried out.

Accordingly, under the decision and order of the Federal Trade Commission appealed from, it would seem that

the only basis the Commission had to try to sustain the order was the fact that the petitioner, Kasson, was an officer of Cosmopolitan.

However, not only is it clear that the Federal Trade Commission order was erroneous as against the Cosmopolitan Association,* but also, assuming *arguendo* only it was proper, it is fundamental that mere holding of an office in a local trade association does not *per se* make each and every officer thereof guilty of a violation of the law.

This fact was recognized by the Court of Appeals in the case at bar in its reversal of the Commission order against Fred Free, Jr. who had been Secretary of the Metropolitan Bag & Paper Distributors Association, Inc. at the time the complaint was filed October 5, 1948.

Were the rule otherwise, we would have an extension of the rule of mere guilt by association far beyond the wildest dreams of government prosecutors.

This Court is undoubtedly familiar with the caution with which it must approach a finding of conspiracy based solely on inference, and the necessity of avoiding extension of the obnoxious doctrine of guilt by association.

Krulewitch v. *United States*, 336 U. S. 440 (1949), rev'g. 167 F. (2nd) 1943 (2d Cir.);

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* The Cosmopolitan Association which did not file a petition for review is in a position similar to that occupied by certain respondents in *Western Sugar Refining Co.* v. *Federal Trade Commission*, 275 Fed. 725, 732 who had accepted the order of the Commission "because they believed they had not violated the statute and had no intention of doing so, and the order imposed no restraint upon them that they cared to resist".

O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592, 602 (1948);
Note 62 Harv. L. Rev. 276 (1948).

In the case at bar, concededly both petitioners, Kasson and Harlem had legal and factual identities entirely separate and distinct from that of their local membership trade association and from the National Paper Trade Association, Inc.

Just as the Court in the recent case of *National Lead Company* v. *Federal Trade Commission*, 227 F. 2d 825 (7th Cir., 1955) found that the Commission erred in issuing a cease and desist order against a parent corporation, the Anaconda Copper Mining Co., merely because of wrongful acts of its wholly owned subsidiaries, where there was no finding of substantial identity between the parent corporation and its subsidiaries, so, too, assuming *arguendo* only that certain acts of the National Paper Association Inc. or any of the 23 local trade associations, including the Cosmopolitan Association were wrongful, the holding of office in said Association by Kasson does not furnish proof that he was a tool of the associations and under the latter's complete control and domination.

Accordingly, there was a complete absence of any evidence, documentary or otherwise, to establish membership in an illegal conspiracy on the part of either of the petitioners herein, Harlem or Kasson.

D. The Federal Trade Commission Failed to Make Specific Findings of Fact in Its Report With Respect to the Petitioners on Review, as Required by Section 5(b) of the Federal Trade Commission Act, That They or Either of Them Violated the Said Act.

As shown *supra*, there was not an iota of proof that either of the petitioners herein engaged in or committed, or threatened to engage in or commit any method of competition, act or practice prohibited by the Federal Trade Commission Act.

Even if we assume *arguendo* only, however, that there was such proof, the Federal Trade Commission has failed to set forth in its report or decision any specific findings of fact with respect to these petitioners as required by Section 5(b) of the Federal Trade Commission Act.

The relevant portion of Section 5(b) of the Federal Trade Commission Act reads as follows:

> "If, upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this act, it shall make a report in writing in which *it shall state its findings as to the facts* and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice".

Although the final order and decision of the Federal Trade Commission is a lengthy one, it will be searched in vain for any specific findings of fact as to participation by these petitioners in the illegal conspiracy as charged.

Typical of the vague and generalized so-called findings made by the Commission which failed to identify the alleged illegality with any particular paper merchant, is the finding contained in Paragraph 14 of its final order and decision where the Commission wrote (47a):

> "Paragraph Fourteen: *A substantial number of respondent paper merchants, the exact number of which is not known,* made use of the Blue Books, Yellow Books and Brown Books, furnishing copies thereof to their sales forces for their use, and said members issued price lists from time to time containing prices, terms and trade practices based upon the Blue Book, Yellow Book and Brown Book, respectively. The said prices, terms and trade practices quoted by the said respondent merchants have been the same on a substantial number of items in their respective trade areas. *The record does not reveal, however, the exact extent of the uniformity prevailing in any particular trade area.*" (italics ours)

Similarly, in dealing with matters of cash discount terms, the following so-called finding of fact contained in Paragraph Fifteen is typical (52a):

> "The respondent member paper merchants in the respective trade areas, during the years 1947 and 1948, discussed at meetings of respondent local and regional (1274) associations the matter of cash discount terms to be observed by them in the sale of fine and wrapping paper, and, in *many* of the trade areas, respondent paper merchants adopted and put into effect uniform cash discount terms inspired and suggested by respondent National Association." (italics ours)

It is clear from the foregoing that there has been a complete failure on the part of the Commission to make the specific findings of fact required by Section 5(b) of the Federal Trade Commission Act and that accordingly, the order of said Commission should be set aside as against the petitioners, Harlem Paper Products Corp. and David Kasson.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAX WECHSLER,
WECHSLER & SOLODAR,
of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 54, 55, 56—October Term, 1956.

(Argued November 14, 1956 . Decided January 9, 1957.)

Docket Nos. 23372, 23373, 23676

METROPOLITAN BAG & PAPER DISTRIBUTORS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

HARLEM PAPER PRODUCTS CORPORATION, *et al.*,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ROBINS PAPER COMPANY OF BALTIMORE CITY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Before:

CLARK, *Chief Judge*, and
FRANK and HINCKS, *Circuit Judges*.

Three petitions by Metropolitan Bag & Paper Distributors Association, Inc., and others, by Harlem Paper Products Corporation and others, and by Robins Paper Com-

pany of Baltimore City, respectively, seek review of an order of the Federal Trade Commission finding the National Paper Trade Association of the United States, Inc., and its affiliates, including the petitioners, engaged in a conspiracy to fix prices and uniform discount terms in the sale and distribution of fine and wrapping paper products, contrary to §5(a) of the Federal Trade Commission Act, 15 U. S. C. §45(a), and directing them to cease and desist from specified activities to that end. Reversed as to Shuttleworth Woolny Co., Inc.; Imperial Bag & Paper Co., Inc.; Daniel W. Margolin; Robins Paper Company of Baltimore City; and Fred Free, Jr.; affirmed as to the remaining petitioners.

NATHAN FRANKEL, New York City (Barshay & Frankel, New York City, on the brief) *for petitioners Metropolitan Bag & Paper Distributors Association, Inc., et al.*

MAX WECHSLER, New York City (Wechsler & Solodar and Albert L. Solodar, New York City, on the brief), *for petitioners Harlem Paper Products Corporation et al.*

JOHN D. ALEXANDER, Baltimore, Md. (Duer & Taylor, New York City, and Wm. Pepper Constable, Baltimore, Md., on the brief), *for petitioner Robins Paper Company of Baltimore City.*

JNO. W. CARTER, JR., Atty., Federal Trade Commission, Washington, D. C. (Earl W. Kintner, Gen. Counsel, and Robert B. Dawkins, Asst. Gen. Counsel, Federal Trade Commission, Washington, D. C., on the brief), *for respondent.*

Appendix A

CLARK, *Chief Judge*:

These are three petitions to review a cease and desist order of the Federal Trade Commission, each petition being filed by paper merchants who belong to a different local trade association. The Commission's complaint had been directed against the National Paper Trade Association, its officers, 23 affiliated local associations, their officers, and some 941 paper merchant members, and charged them with conspiracy to fix uniform prices and discount terms in the sale and distribution of "fine paper" (printing and book paper, stationery) and "wrapping paper" (wrapping, toilet tissue, towels, drinking cups, etc.), in violation of §5(a) of the Federal Trade Commission Act, 15 U. S. C. §45(a).

The Commission found a conspiracy clustering around the efforts of National to (1) issue Blue, Yellow, and Brown (price) Books; (2) keep members' cash discounts uniform, despite a shift in manufacturers' credit terms in 1946; (3) co-operate with regional efforts at price fixing. For the purposes of this review we must take the main conspiracy, spearheaded by National, as established and have to determine only whether the petitioners, operating somewhat on the periphery, have been properly implicated, i.e, whether as to each petitioner the Commission's finding of participation is supported by the necessary minimum of substantial evidence. *Excelsior Laboratory* v. *F. T. C.*, 2 Cir., 171 F. 2d 484, 486. The chief question is whether there was substantial evidence to link the petitioners to the second and third of National's goals which we have stated. A subordinate question the petitioners attempt to raise is that they were unfairly discriminated against by the Commission's order of dismissal entered in favor of various correspondents.

I. *The New York City Petitioners*

(1) *Metropolitan Bag & Paper Distributors Association, Inc.* Four local trade associations—"New Jersey,"

"New York," "Cosmopolitan," and "Metropolitan"—engaged in a regional conspiracy to fix prices and credit terms of wrapping paper products from 1934 to the time of the complaint. There were six points of contact between this regional conspiracy and the national one: (1) all four local associations were dues-paying members of the national association; (2) in January 1936 the national group gave information to a regional council composed of three of these local associations engaged in price-fixing; (3) in April 1940 the national group organized a regional council of these four local associations for illegal activities; (4) in November 1943 the president of Cosmopolitan urged its members to pay national dues; (5) in January 1947 Cosmopolitan's Board of Directors discussed writing the national group concerning proposed standardized credit terms; and (6) in 1948 and 1949 officers of Yorkville Paper Company, Inc. (a member of Metropolitan), and A. E. MacAdam & Co., Inc. (another member of Metropolitan), served as officers of the national group, as did an officer of Harlem Paper Products Corporation (a member of Cosmopolitan).

We must accept the inferences drawn by the Commission that (1) the regional council created in 1940 continued in existence until the filing of the complaint; (2) the members of the local councils who had dealings with the national group in 1936, 1940, and 1947 knew of its purposes and joined in the conspiracy to further them; and (3) these local trade associations on continuing to be members of National are to be charged with all they would have learned had they tried to discover what National was doing with their dues and moral support. *Phelps Dodge Refining Corp.* v. *F. T. C.*, 2 Cir., 139 F. 2d 393, 396. Metropolitan Bag & Paper Distributors Association, Inc., as one of these four local trade associations, can thus be found to be a national conspirator.

(2) *Yorkville Paper Company, Inc.* This company was a member of Metropolitan in December 1941; and Arthur H. Stein, an officer of Yorkville, was president of Metropolitan at that time. Stein was an officer of the national group for the year 1948-1949, and was a speaker at the 1948 national convention. He was also president of Metropolitan in 1942 when the organization was engaged in efforts at standardizing credit terms in the industry and similar practices. While Stein was Metropolitan's president that group paid at least $750 dues to the national association. Thus there was sufficient proof to link Yorkville to the national conspiracy.

(3) *A. E. MacAdam & Co., Inc.* This corporation was a member of Metropolitan in December 1941, June 1942, and at the time the complaint was filed. It was represented by Alfred E. MacAdam, III, at Metropolitan's meetings of December 1941 and June 1942. In 1941 Alfred E. MacAdam was appointed to Metropolitan's Finance Committee, charged with getting money to cover the expense of national dues and the local credit bureau. MacAdam was chairman of the local credit bureau committee which worked with other local trade associations to establish uniform regional credit terms. MacAdam was a speaker at the 1948 national convention and was a national officer for 1948-1949. Consequently there was enough evidence to connect this corporation with the national conspiracy.

(4) *John H. Free, Inc.* This corporation was a member of Metropolitan in 1941, 1942, and at the time the complaint was filed. It was represented at the December 1941 and June 1942 meetings of Metropolitan where the members discussed paying national dues; forming a credit bureau; distributing resale price tables; and establishing central control over all advertising done by members of Metropolitan.

The Commission could properly infer that this corporation knew the purposes of Metropolitan, knew of Metropolitan's connection with the national conspiracy, and continued to remain a member of Metropolitan and the National Association. John H. Free, Inc., was thus adequately linked to the national conspiracy.

(5) *S. Posner Sons, Inc.* The evidence against this corporate member of Metropolitan is identical with the evidence against John H. Free, Inc.

(6) *Shuttleworth Wolbig Co., Inc.* This was another corporate member of Metropolitan, but there is no proof that its representatives attended any meetings, paid any dues, or participated in the activities of Metropolitan or the national group. There is no basis for inferring that the petitioner had any knowledge of Metropolitan's illegal activities. There is no evidence that Metropolitan was a small group, and the probability is that it was large inasmuch as the Commission began the action by naming four persons at random to represent the class of Metropolitan's members. The petitioner is one of the members so selected. Although the petitioner was in the same trade as Metropolitan and would presumably benefit from Metropolitan's illegal acts, the Commission may not infer participation in a conspiracy from mere membership in the trade association without more. *Phelps Dodge Refining Corp.* v. *F. T. C.*, *supra*, 2 Cir., 139 F. 2d 393, 396.

(7) *Fred Free, Jr.* The only evidence against this individual is his admission that he was secretary of Metropolitan at the time the complaint was filed—October 5, 1948. Metropolitan, as indicated previously, was last shown to have participated actively in the national conspiracy in 1940, and the Commission inferred continued participation in it because Metropolitan continued to pay national dues

and several officers of Metropolitan's corporate members were national officers in 1948. The Commission argues that active participation in 1948 is shown by Metropolitan's attempt to fix the regional resale price of wrapping paper products in 1941 and National's adoption of that goal on a larger geographical scale in 1947-1948. Such delayed parallel action seems too meager evidence to be probative of conspiracy, even though two officers of Metropolitan's member corporations were officers of the national group for 1948-1949. Without proof of the role of these two officers in the national conspiracy we would hesitate to affirm a finding that Metropolitan was visibly engaged in the national conspiracy at the time when Fred Free became its secretary. Accepting such a finding, *arguendo*, there is still no substantial evidence that Free was a conspirator. *Phelps Dodge Refining Corp.* v. *F. T. C.*, *supra*, 2 Cir., 139 F. 2d 393, 397. In the *Phelps Dodge* case we dealt with a "board member" rather than a "secretary," but there is nothing in the present record to suggest that Free knew about Metropolitan's illegal life; and to infer so much from his title is unwarranted.

(8) *Harlem Paper Products Corporation.* Harlem was a corporate member of Cosmopolitan—one of the four local trade associations in greater New York City. Mr. David Kasson, a leader in all aspects of restraint of trade in wrapping paper products in this region from 1934 to 1947, represented Harlem throughout this period, including the times when he served on the 1936 and 1940 regional councils. There is sufficient evidence against Harlem.

(9) *David Kasson.* There is adequate evidence to connect this individual with the national activities, as well as regional efforts at unfair competition. In 1943 he urged members of Cosmopolitan to pay national dues, and in 1948

he was on the National Association's Board of Directors. He was the moving spirit in local efforts at uniform credit terms in 1941-1942, and he discussed a letter from the National Association in 1947 which dealt with the same topic.

(10) *Imperial Bag & Paper Co., Inc.; Daniel W. Margolin d/b/a Liberty Bag & Paper Co.* These two members of Cosmopolitan were selected at random to represent the class of members. The proof against them is identical with that against Shuttleworth Woolny Co., Inc., discussed previously, and is similarly insufficient.

II. *The Baltimore Petitioner; Robins Paper Company*

The sole petitioner from Baltimore is Robins Paper Company, a member of the local Maryland trade association. Maryland was engaged in restraint of trade in 1932 and during the NRA period—1933 through 1936. In 1947-1948 Maryland complied with a request of the National Association, of which it was a member, to submit its minutes to the national group for approval. The Commission is warranted in inferring that the "approval" amounted to censorship and that Maryland and National were then engaged in fixing prices of fine and wrapping paper products. This is borne out by the number of officers of Maryland's members who were on committees of National for 1948-1949.

The record reveals that Robins resigned from Maryland in 1936. In its answer Robins admitted being a member of Maryland at the time the complaint was filed in 1948. There is no evidence that Robins was an active member, paid dues, attended meetings, or had knowledge of Maryland's activities. None of Robins' officers were on the committees of the national trade association. Robins appears to be a member selected at random to represent the class of members of Maryland. Robins was represented at one meeting

of Maryland in 1932 where local illegal trade practices were discussed. It continued membership during NRA days when similar practices were continued with government approval. This knowledge of Maryland's behavior during the depression was not so damning as to put Robins on notice at the time it rejoined the trade association that Maryland might be engaged in a national price-fixing conspiracy; consequently Robins cannot be charged with knowledge of all that dilegent inquiry would have revealed concerning Maryland's role in this present conspiracy.

The remaining points raised by the petitioners we find without merit. The findings of the Commission were sufficiently detailed to permit appellate review; and the Commission's decision not to proceed against other conspirators appears to be within its discretion so as to give the present petitioners no ground for complaint on this review.

The order of the Commission on review is set aside as to petitioners Shuttleworth Wollny Co., Inc.; Imperial Bag & Paper Co., Inc.; Daniel W. Margolin d/b/a Liberty Bag & Paper Co.; Robins Paper Company; and Fred Free, Jr. It is affirmed as to the remaining petitioners, and an order of enforcement against them will be entered by us.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 55—October Term, 1956.

(Petition filed February 1, 1957

Decided February 18, 1957.)

Docket No. 23373

HARLEM PAPER PRODUCTS CORPORATION, *et al.*,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Before:

CLARK, *Chief Judge*, and HINCKS, *Circuit Judge*.

On Petition for Rehearing.

WECHSLER & SOLODAR, New York City (Max Wechsler and Albert L. Solodar, New York City, of counsel), *for petitioner Harlem Paper Products Corp.*

ROBERT B. DAWLINS, Asst. Gen. Counsel, and JNO. W. CARTER, JR., Atty., Federal Trade Commission, Washington, D. C., *for respondent.*

Appendix B

PER CURIAM:

Petition for rehearing denied.

The second sentence of the paragraph on page 357 of the slip opinion headed "(8) *Harlem Paper Products Corporation.*" is changed to read: Mr. David Kasson, a leader in all aspects of restraint of trade in wrapping paper products in this region from 1934 to 1947, represented Harlem in 1948 on the Board of Directors of the National Association.

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APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 23372

METROPOLITAN BAG & PAPER DISTRIBUTORS ASSOCIATION, INC., *et al.*,

Petitioners

v.

FEDERAL TRADE COMMISSION,

Respondent.

No. 23373

HARLEM PAPER PRODUCTS CORPORATION, *et al.*,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

No. 23676

ROBINS PAPER COMPANY OF BALTIMORE CITY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST AS TO CERTAIN PETITIONERS AND SETTING ASIDE ORDER TO CEASE AND DESIST AS TO CERTAIN OTHER PETITIONERS

Metropolitan Bag & Paper Distributors Association, Inc., Fred Free, Jr., individually and as its Secretary; A. E.

MacAdam & Company, Inc., John H. Free, Inc., Shuttleworth Co., Inc., S. Posner Sons, Inc., Yorkville Paper Company, Inc., Harlem Paper Products Corporation, Imperial Bag & Paper Co., Inc., Daniel W. Margolin doing business as Liberty Bag & Paper Co. and David Kasson, having filed in this Court on December 7, 1954, and Robins Paper Company of Baltimore City, having filed in the United States Court of Appeals for the Fourth Circuit on December 8, 1954, their petitions to review and set aside insofar as said petitioners are concerned, an order to cease and desist issued against said petitioners, among others, on September 24, 1954, by the Federal Trade Commission, respondent herein, in a proceeding before said respondent entitled "In the Matter of National Paper Trade Association of the United States, Inc., et al"; and the United States Court of Appeals for the Fourth Circuit having removed and transferred said petition filed by Robins Paper Company of Baltimore City to this Court on May 26, 1955; and these causes having been heard by this Court on briefs and oral argument; and this Court having rendered its decision on January 9, 1957, setting aside said order to cease and desist as to petitioners Shuttleworth Woolny Co., Inc., Imperial Bag & Paper Co., Daniel W. Margolin doing business as Liberty Bag & Paper Co., Robins Paper Company of Baltimore City, and Fred Free, Jr., and denying said petitions and affirming said order to cease and desist as to petitioners Metropolitan Bag & Paper Distributors Association, Inc., A. E. MacAdam & Company, Inc., John H. Free, Inc., S. Posner Sons, Inc., Yorkville Paper Company, Inc., Harlem Paper Products Corporation, and David Kasson; and Harlem Paper Products Corporation having filed in this Court on February 4, 1957, its petition for rehearing; and Metropolitan Bag & Paper Distributors Association, Inc., A. E. MacAdam & Company, Inc., John H. Free, Inc., S. Posner Sons, Inc. and Yorkville Paper

Company, Inc. having filed in this Court on February 20, 1957, their petition for rehearing; and this Court having on February 18, 1957, and February 28, 1957, respectively, denied said petitions for rehearing;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the said order to cease and desist be, and it hereby is, set aside as to petitioners Shuttleworth Wolfny Co., Inc., Imperial Bag & Paper Co., Inc., Daniel W. Margolin doing business as Liberty Bag & Paper Co., Robins Paper Company of Baltimore City and Fred Free, Jr.; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the aforesaid petitions to review and set aside said order to cease and desist, as to petitioners Metropolitan Bag & Paper Distributors Association, Inc., A. E. MacAdam & Company, Inc., John H. Free, Inc., S. Posner Sons, Inc., Yorkville Paper Company, Inc., Harlem Paper Products Corporation and David Kasson be, and they hereby are, dismissed, and that said order to cease and desist be, and it hereby is, affirmed and enforced as to said petitioners and that said petitioners be, and they hereby are, commanded to obey said order to cease and desist and to comply therewith; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within ninety days after the entry of this decree petitioners Metropolitan Bag & Paper Distributors Association, Inc., A. E. MacAdam & Company, Inc., John H. Free, Inc., S. Posner Sons, Inc., Yorkville Paper Company, Inc., Harlem Paper Products Corporation, and David Kasson shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied with said order to cease and desist.

Appendix C

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the aforesaid order to cease and desist, hereby affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of these causes to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

CHARLES E. CLARK

CARROLL C. HINCKS

United States Circuit Judges.

Dated: March 19, 1957

Entered March 19, 1957
Clerks Office
Circuit Court of Appeals
2nd Circuit

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:

American Chain & Cable Co., Inc. v. *Federal Trade Commission*, 142 F. 2d 909 — 7

Automatic Canteen Co. v. *Federal Trade Commission*, 346 U.S. 61 — 9

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U.S. 197 — 8

Federal Trade Commission v. *Cement Institute*, 333 U.S. 683 — 6

Metropolitan Bag and Paper Distributors Association, Inc., et al. v. *Federal Trade Commission*, No. 190, this Term — 3

Statutes:

Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45:

Section 5(a)(1) — 2

Section 5(a)(6) — 2

Section 5(b) — 2, 7, 9

Section 5(c) — 8

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 196

HARLEM PAPER PRODUCTS CORP. AND DAVID KASSON, PETITIONERS

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 23-33) is reported at 240 F. 2d 341.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1957. The petition for a writ of certiorari was filed on June 15, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that there is substantial evidentiary support for the Fed-

eral Trade Commission's finding that petitioners were parties to a nationwide price-fixing conspiracy.

2. Whether the Commission made adequate findings that petitioners were parties to the conspiracy.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * * * *
>
> (b) * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served * * * an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

STATEMENT

Petitioners seek review of the same judgment of the court of appeals of which review is sought in

Metropolitan Bag and Paper Distributors Association, Inc., et al. v. *Federal Trade Commission*, No. 190, this Term. The judgment upheld in part and reversed in part a Commission cease-and-desist order directed against a nationwide price-fixing conspiracy in the fine and wrapping paper business.

The facts are fully set forth in the Commission's brief in opposition in the *Metropolitan* case, to which we respectfully refer the Court. The only difference, insofar as the Commission proceedings were concerned, was that in the instant case petitioners filed an answer in which, in addition to consenting to the introduction of documentary and other evidence in support of the complaint and the drawing of inferences therefrom, they conceded that "the acts and practices thereby indicated may be deemed to reflect in effect an agreement or understanding," and stated that "they will not offer explanation of or evidence to contradict the evidence" which they consented to being made a part of the record (Pet. App. 208a).[1]

In holding that there was substantial evidentiary support for the Commission's finding that petitioners had participated in the nationwide conspiracy, the court of appeals pointed out that petitioner Kasson was "a leader in all aspects of restraint of trade in wrapping paper products in this region from 1934 to 1947," and was closely connected with both the national and the regional efforts at unfair competition (Pet. 29-30); that petitioner Harlem Paper

[1] "Pet. App." refers to petitioners' appendix in the court of appeals, and "Resp. App." refers to the Commission's appendix in that court.

Products Corporation ("Harlem") was a corporate member of one of the four local trade associations in greater New York, which the court found had been "engaged in a regional conspiracy to fix prices and credit terms of wrapping paper products from 1934 to the time of the complaint" (Pet. 26); and that Kasson had represented Harlem in 1948 on the board of directors of the national trade association (Pet. 29, 30).

ARGUMENT

1. Petitioners' principal contention (Pet. 10-18) is that the Commission's finding that they had participated in the nationwide price-fixing conspiracy in the paper industry is not supported by substantial evidence.[2] The court of appeals, however, fully considered that contention and resolved it against petitioners, and we submit that the correctness of that factual ruling does not present a question calling for further review by this Court. Moreover, we believe that the Commission was fully justified in concluding, on the basis of the record before it, that both petitioners were parties to the conspiracy.

Contrary to petitioners' argument (Pet. 16-17), the order against Kasson does not rest solely on the fact that, during the period of the conspiracy, he served as executive director and president of Cosmopolitan Twine & Paper Association, Inc. ("Cosmopolitan") (Pet. App. 35a), one of the four metropolitan New York City trade associations which, the

[2] Petitioners do not deny the existence of such a conspiracy.

court of appeals pointed out (Pet. 26), were "engaged in a regional conspiracy to fix prices and credit terms of wrapping paper products from 1934 to the time of the complaint."[3] In addition, the evidence showed that he had participated in, and addressed, meetings of Cosmopolitan at which price-fixing was considered and effectuated, and had conferred with representatives of the other New York City associations on that subject (Ex. 760, Resp. App. 38; Ex. 762, Resp. App. 39-40; Ex. 766, Resp. App. 42; Ex. 770, Resp. App. 44; Ex. 657-A—657-D, Pet. App. 304a-305a; Ex. 659A and B, Pet. App. 310a-311a; Ex. 660-A-660-C, Pet. App. 312a-313a; Ex. 747-A and B, Pet. App. 318a-319a; Ex. 752-A and B, Pet. App. 323a). As the court of appeals noted (Pet. 29-30), in 1943 Kasson urged members of Cosmopolitan to pay dues to the national association; he was also "the moving spirit in local efforts at uniform credit terms in 1941-1942, and he discussed a letter from the National Association in 1947 which dealt with the same topic." Kasson was a member of the board of directors of the national association (which the court of appeals found had "spearheaded" the conspiracy, Pet. 25) in 1948 and 1949, and during those years was a member of its Wrapping Paper Governing Committee (Ex. 868, 869, Resp. App. 48-49). Such participation in trade association activities which were "intended to eliminate price competition through the collective efforts" of their members was

[3] Cosmopolitan itself was an active participant in the national conspiracy.

proper evidence of his connection with the conspiracy. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 719. In the language of the court of appeals (Pet. 29), Kasson was "a leader in all aspects of restraint of trade in wrapping paper products in this region from 1934 to 1947," and, as such, was properly found by the Commission to have been a party to the conspiracy.

Petitioner Harlem was a member of Cosmopolitan, one of the four local New York City associations which had been active in the conspiracy. Kasson, whose connection with the conspiracy has already been summarized, represented Harlem in 1948 and 1949 on the board of directors of the national association (Ex. 868, 869, Resp. App. 48-49). The documentary evidence showing such representation also indicated that the other members of the board, and the various committee members, were representatives of dealers and not of local trade associations. Since Harlem had stated that it would not endeavor to contradict the documentary evidence which the Commission introduced, and had authorized the Commission to draw inferences from such evidence, we submit that it was not unreasonable for the Commission to have concluded, on the basis of the record before it, that Kasson in fact had represented Harlem in 1948 and 1949 on the board of directors of the national association.[1]

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[1] Although petitioners state (Pet. 6, 9, 10) that the national conspiracy terminated in 1947, the Commission did not so find. It found that the conspiracy had begun prior to that date, and had been "since carried out" (Pet. App.

In its petition for rehearing in the court of appeals, Harlem for the first time contended that the Commission's exhibits showing that Kasson served on the board of directors of the national association as a representative of Harlem were erroneous, and that in fact he was solely the representative of Cosmopolitan (the local trade association). The Commission opposed the petition on the theory that sound judicial practice would not permit such a belated attempt to disavow the stipulation upon which the case had been tried and upon which the court of appeals had upheld the sufficiency of the evidence, namely, that petitioners would not "offer * * * evidence to contradict the evidence" which, with their consent, the Commission had introduced (Pet. App. 208a). Such evidence included the documents showing that Kasson's membership on the board of directors of the national association in 1948 and 1949 had been as a representative of Harlem.

The Commission's power to modify or set aside its orders (38 Stat. 719, as amended, 15 U.S.C. 45(b)) is suspended while petitions for review thereof are pending. *American Chain & Cable Co., Inc.* v. *Federal Trade Commission*, 142 F.2d 909 (C.A. 4). But when the present review proceedings are terminated, Harlem may apply to the Commission to have the

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57a), *i.e.*, it had continued to the time of the Commission's decision (September, 1951). Since the conspiracy was a continuing one, evidence linking Kasson to Harlem was properly relied on, even though it related to events which occurred after the complaint had been filed but while the conspiracy was still operative.

order set aside as to it on the ground that Kasson was never actually connected with Harlem despite the evidence now of record. The Commission will, of course, act on such motion and vacate its order against Harlem if that is proper and appropriate. We believe, however, that the Commission properly entered an order against Harlem on the basis of the record before it, and that the court of appeals properly upheld that order and denied rehearing. The appropriate procedure was for Harlem to call the mistake, if such it be, to the Commission's attention while the proceeding was still pending before it, and not to wait until after the court of appeals had affirmed the Commission's order.[5] Even now, the proper method for attempting to correct any error that may have resulted from Harlem's failure timely to bring before the Commission the facts with respect to Kasson's relationship to Harlem is to seek modification of the order by the Commission, not to seek review of this factual question by this Court.

2. Petitioners also contend (Pet. 19-21) that the Commission failed to make "specific findings of fact" with respect to their being parties to the conspiracy,

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[5] Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. 45(c), provides for an application to the reviewing court for "leave to adduce additional evidence", upon a showing "to the satisfaction of the court that such additional evidence is material and that there were *reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission*" (emphasis added). Petitioners did not make such an application to the court of appeals. Their failure to do so can, in itself, be deemed a waiver of the point. See *Consolidated Edison Co.* v. *Na-*

as required by Section 5(b) of the Federal Trade Commission Act.

The Commission found (Pet. App. 57a) that, prior to 1947, "the respondent paper merchants, together with respondent associations, and respondent officers, have entered into and * * * carried out an unlawful planned course of action, understanding and agreement to hinder, lessen, eliminate, limit, and restrain competition in prices, practices, terms and discounts * * * in the sale and distribution of fine and wrapping paper," and, pursuant to such conspiracy, had engaged in a number of designated restrictive practices (*id.* 58a). Each of the respondents thus covered was identified (*id.* 14a-38a), including both petitioners (*id.* 35a). The Commission's findings also described in considerable detail the operations of the conspiracy, and set forth illustrative examples of the various price-fixing activities in which the conspirators engaged (*id.* 39a-56a).

Read in its entirety, we believe that these findings satisfied the command of Section 5(b) that the Commission "state its findings as to the facts." In a case of this magnitude, involving a nationwide conspiracy and more than 200 parties, the Commission is not required to make any further "particularization in its findings" (*Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 81), or to detail the evidence upon which it based its findings as to each respondent's participation in the conspiracy.

CONCLUSION

The decision below is correct, no important question is presented, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1957

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